IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No. 471.

RUST LAND & LUMBER COMPANY,
Plaintiff in Error,

v.

ED JACKSON, Et Al,
Defendants in Error.

MOTION TO DISMISS OR AFFIRM.

Defendants in Error move the dismissal of the writ of error herein because—

1. Not properly sued out, in this: Plaintiff in Error obtained possession of the logs in controversy from the Sheriff of Coahoma County, Mississippi, by the execution of forthcoming bond with United States Fidelity and Casualty Company, as surety, conditioned to have the property forthcoming to abide the judgment of the Circuit Court of Coahoma County, which rendered judgment against plaintiff in error, that it forthwith restore the property or failing therein, that defendants in error do recover of the plaintiff in error and said United States Fidelity & Casualty Company thirty-six hundred dollars; said Casualty Company has not appealed to the Supreme Court of Mississippi, from said judgment of date December 3rd, 1913 (R. 164), and it has become final under the laws of Mississippi. Said Casualty Company was not before the Supreme Court of Mississippi, and before consideration may be had hereof said Casualty Company should have been brought seasonably before this Court, which has not been done.

2. That on its appeal bond from the Circuit Court of Coahoma County to the Supreme Court of the State

of Mississippi, said Rust Land & Lumber Company gave as surety, the United Casualty & Surety Company (Record, 166) against which final judgment was rendered by the Supreme Court of the State of Mississippi (Record page 171), and said surety thereon is not before this Court.

3. No Federal question is shown to be involved, in this: Under the statutes and decisions of Arkansas, the abutting owner upon navigable streams owns only to the ordinary high water mark and the bed of the stream is the property of Arkansas. The burden of proof herein being upon plaintiff in error, there is no showing of title by plaintiff in error to any portion of the bed of the Mississippi River, which has filled up after the avulsion of 1848; on the contrary, plaintiff in error shows title to only Sections 22 and 23, Township 4, Range 4 East, Phillips County, paying taxes upon only these parcels (R. 98 to 120 inclusive), which lands do not at any point reach the thread of the main channel of the Mississippi River.

4. No Federal question is shown to be involved in this: No opinion was rendered by the State Supreme Court herein, said Court expressly refusing to file a written opinion though required by statute to do so when its decision adjudicated any question of importance, and the plaintiff in error expressly stated the necessity therefor in order to make the presentation to this Court. (R. 174).

5. Said record fails to present any federal question properly raised at a proper time, the only attempt being in the petition for a re-hearing, which was too late for the presentation and reservation of such federal question.

6. Said record containing no evidence to show where said line was between the states of Mississippi and Arkansas in 1848, the said Supreme Court was with-

out power to reverse said decision of the Circuit Court, and if said decision is to be reversed it can be done only upon a writ of error directed to said Circuit Court of Coahoma County, not to the Supreme Court of the State of Mississippi, whose jurisdiction is conditioned upon the error appearing in the record, and whose jurisdiction is limited strictly to that of a court of appeals.

But should it be held by this Court that a federal question was presented sufficient to sustain the writ of error, then the judgment of the Supreme Court of the State of Mississippi should be affirmed on this motion, because—

(1) There are ample grounds shown by the record independent of such federal question upon which said Supreme Court could and did place its decision, embracing—

(a) The fact that plaintiff in error did not have title to the state boundary line.

(b) That possession of defendants in error gave them title as against all parties save the state of Arkansas.

(c) That plaintiff in error was without right as an individual as against defendants in error as individuals, irrespective of the sovereignty of the states in the premises.

2. Because both the states of Arkansas and Mississippi have fixed upon the same thread of the stream as a dividing line and this will be conclusive.

3. That in this record seeking to reverse the judgment of the Circuit Court of Coahoma County, there is no proof whatever as to where the said line was in 1848 at the time of the avulsion, and the burden of proof being upon the plaintiff in error, judgment final should have been directed for the defendant in error for want of sustaining proof.

4. The evidence shows that the correct line puts all

of the land on which this timber was cut within the state of Mississippi, wholly irrespective of any federal question.

5. The Supreme Court of the State of Mississippi was without authority to reverse the judgment of the Circuit Court of Coahoma County, Mississippi, unless it affirmatively appeared that there was error in said record.

Wherefore, should jurisdiction be maintained, defendants in error move for an affirmance under the rule.

GEORGE F. MAYNARD,
GERALD FITZGERALD,
Clarksdale, Miss.;
MARCELLUS GREEN,
GARNER WYNN GREEN,
Jackson, Miss.,
Attorneys for Defendants in Error.

CERTIFICATE OF SERVICE.

I do hereby certify that I sent by mail by registered letter to Mr. Herbert Pope, Attorney for Plaintiff in Error, Monadnock Block, Chicago, Ill., on the..... day of April, 1918, a copy of this motion, together with a copy of the Brief for Defendants in Error in support thereof, this the.....day of April, 1918.

GARNER W. GREEN,
Of Attorneys for Defendants in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

RUST LAND & LUMBER COMPANY,
Plaintiff in Error,

v.

ED JACKSON, Et Al,
Defendants in Error.

BRIEF UPON MOTION TO DISMISS OR AFFIRM.

Defendants in error herein file a motion to dismiss or affirm and rely upon—

POINTS.

I.

WRIT OF ERROR NOT PROPERLY SUED OUT IN THIS: IT FAILS TO BRING PROPERLY BEFORE THIS COURT ALL PERSONS NECESSARY.

(1) THE SURETY UPON THE FORTHCOMING BOND AGAINST WHOM JUDGMENT WAS RENDERED BY THE CIRCUIT COURT OF COAHOMA COUNTY, AND

(2) THE SURETY UPON THE APPEAL BOND

FROM THE CIRCUIT COURT OF COAHOMA COUNTY TO THE STATE SUPREME COURT.

Mason v. United States, 136 U. S. 581; *Hardee v. Wilson,* 146 U. S. 181; *Haight v. Robinson,* 203 U. S. 581; *Fiebleman v. Packard,* 108 U. S. 14; *Simpson v. Greeley,* 20 Wall. 162; *Masterton v. Herndon,* 10 Wall. 416; *Williams v. Bank,* 11 Wheat. 414; *Moon v. Simonds,* 100 U. S. 145; *Smith v. Strader,* 12 How. 327; *Estes v. Traube,* 128 U. S. 230; *Owens v. Kincannon,* 7 Pet. 399; *Wilson v. Insurance Co.,* 12 Pet. 140; *Todd v. Daniels,* 16 Pet. 521; *Davenport v. Fletcher,* 16 How. 142; *Mussina v. Cavazos,* 20 How. 280.

II.

UNDER THE STATUTES AND DECISIONS OF ARKANSAS, THE ABUTTING OWNER UPON NAVIGABLE STREAMS OWNS ONLY TO THE ORDINARY HIGH WATER MARK AND THE BED OF THE STREAM IS THE PROPERTY OF THE STATE, AND IN THE CASE AT BAR PLAINTIFF IN ERROR FAILED TO SHOW TITLE TO ANY LAND BELOW SAID HIGH WATER MARK OR TOUCHING THE BOUNDARY OF MISSISSIPPI AT ANY POINT.

Arkansas v. Tennessee, Original No. 4, Docket 1917; *Johnson v. Quarles,* 182 S. W. 283; *Kinnanne v. State,* 106 Ark. 283; *Railroad Co. v. Ramsey,* 8 L. R. A. 557; *Borough v. Boyle,* 108 S. W. 379; *Polack v. Stankey,* 100 Ark. 36; *Sand Co. v. Attorney General,* 180 S. W. 219; *Session Laws, Arkansas* 1892, 207. Ciena v. Tenn. No. 20; Oct. 10, 1917; decided Mar. 11, 1918.

III.

THE SUPREME COURT OF MISSISSIPPI GAVE NO WRITTEN OPINION, EXPRESSLY OVERRULING A MOTION WHEREUNDER A FEDERAL QUESTION WAS SOUGHT TO BE MADE.

THERE ARE AMPLE NON-FEDERAL GROUNDS WHEREUPON SAID JUDGMENT MAY BE SUPPORTED.

Power Co. v. Railroad Co., 244 U. S. 303; (Cases there reviewed) *Allen v. Arguinbau*, 198 U. S. 155; *Dibble v. Bellingham Bay Land Company*, 163 U. S. 63; *Klinger v. Missouri*, 13 Wall. 257.

IV.

ONLY ATTEMPT TO RAISE FEDERAL QUESTION WAS UPON MOTION FOR WRITTEN OPINION AFTER DECISION MADE, WHICH WAS TOO LATE.

Meyer v. Richmond, 172 U. S. 92; *Turner v. Richardson*, 180 U. S. 92.

V.

SUPREME COURT OF MISSISSIPPI ONLY A COURT OF APPEALS, WITHOUT ORIGINAL JURISDICTION, AND IF THE DECISION HERE ASSAILED IS TO BE REVERSED, IT MUST BE BY WRIT OF ERROR TO THE CIRCUIT COURT OF COAHOMA COUNTY.

Should the Court take jurisdiction, we then insist that the judgment should be affirmed, because

VI.

AMPLE NON FEDERAL GROUNDS EXIST WHEREUPON THE JUDGMENT MAY BE SUPPORTED.

STATEMENT OF THE CASE.

This writ of error is to the Supreme Court of the State of Mississippi, seeking to reverse a judgment there which, without opinion, affirmed a judgment in favor of defendant in error, rendered by the Circuit Court of Coahoma County.

Defendants in error were ignorant negroes who in

good faith purchased certain timber located upon about 30 acres of ground—the situs whereof will be seen upon the map annexed to the record. They had cut these trees down, and worked upon them, and were at their homes in Mississippi when a representative of plaintiff in error got a "High Sheriff" of Arkansas, crossed the Mississippi line and served notice that if they did not at once give up this timber that they would, without more ado be carried off to jail. As one of them expresses it: "I just give down, had to give down," (R. 20), whereupon the defendants in error "pleaded to lawyer Fitzgerald for relief" (R. 20) with the result that upon his advice the raft was completed and levied upon under a writ of replevin. Thereupon the plaintiff in error gave bond for the property with the United States Fidelity & Guaranty Company as surety, and upon a trial of some length, the jury found for the negroes and the judgment was affirmed.

ARGUMENT.

I.

All parties must be brought before this court.

Plaintiff in error, in the petition for a writ of error (Transcript 181), and in the writ of error (Transcript 191) fails to make parties—

(a) The United States Fidelity & Guaranty Company of Baltimore, Maryland, the surety upon the forthcoming bond (Transcript 3), said judgment, reciting:

> "It is, therefore, ordered and considered * * * that the defendant restore to the plaintiff * * * the property levied on herein, and in default thereof that said plaintiffs do have and recover of the defendant, the Rust Land & Lumber Company, the United States Fidelity & Guaranty Company of Baltimore, Maryland, the sureties on their bond the sum of thirty-six hundred dollars ($3,600.00), and all costs in this behalf expended."

(b) The United Casualty & Surety Company;

(Transcript 166) the judgment in the Supreme Court of Mississippi reciting:

> "And that appellees do have and recover of appellant and the United States Casualty Company (should be United Casualty & Surety Company) surety in the supersedeas bond, the sum of thirty-six hundred dollars ($3,600.00)."

In *Mason v. United States,* 136 U. S. 581, 34 Law. Ed., 545, the syllabus correctly states the decision thus:

> "Where a judgment is joint, against several, and the interests of all are affected by the judgment, all must join in the writ of error, or it will be dismissed unless there has been a summons and severance.
>
> "(2) Where the writ of error was sued out by a part only of joint defendants against whom a joint judgment was rendered, this court will not permit it to be amended here by inserting names of the other defendants as plaintiffs in error, nor a judgment of severance on their consent."

Hardee v. Wilson, 146 U. S. 181; approved in *Haight v. Robinson,* 203 U. S. 581.

See also: *Feibleman v. Packard,* 108 U. S. 14; *Simpson v. Greeley,* 20 Wall. 162; *Masterton v. Herndon,* 10 Wall. 416; *Williams v. Bank,* 11 Wheat. 414.

See as to an appeal:
Moon v. Simonds, 100 U. S. 145; *Smith v. Strader,* 12 How. 327.

In *Estes v. Traube,* 128 U. S. 230, the court said:

> "It is well settled that all the parties against whom a judgment of this kind is entered must join in a writ of error, if any of them takes out such writ; or else there must be a proper summons and severance, in order to allow of the prosecution of the writ by not less than the whole number of the defendants against whom the judgment is entered.

Williams v. Bank of United States, 24 U. S. 11, Wheat. 414; *Owings v. Kincannon,* 32 U. S., 7 Pet. 399; *Wilson v. Life & Fire Ins. Co., of New York,* 37 U. S., 12 Pet. 140; *Todd v. Daniel,* 41 U. S., 16 Pet. 521; *Davenport v. Fletcher,* 57 U. S., 16 How. 142; *Mussina v. Cavazos,* 61 U. S., 20 How. 280, 289; *Sheldon v. Clifton,* 64 U. S., 23 How. 481, 484; *Hampton v. Rouse,* 13 Wall. 187.

These decisions render it absolutely certain, therefore, that the writ of error herein sued out by the Rust Land & Lumber Company, which is not in any way participated in by the surety on the appeal bond in the supreme court and which is in no way participated in by the surety in the circuit court of Coahoma county, does not effectually transfer appellate jurisdiction to this court to consider this cause.

Therefore, under these decisions, there having been no summons and severance, and no participation by either (a) said United Casualty and Surety Company; or (b) the United States Fidelity & Guaranty Company, of necessity, this writ of error must be dismissed.

Section 1005 of the Revised Statutes does not reach. *Mason v. U. S., supra; Estes v. Traube, supra; Hardee v. Wilson, supra.*

The contention that a surety is not an essential party is settled by numerous of the foregoing decisions.

Under the Mississippi decisions the same doctrine is applicable. In *Thomas v. Wyatt,* 17 Miss. 309, that court says:

"The action was replevin, brought by Thomas against Wyatt. The verdict was for the defendant, and the court rendered judgment as the statute requires, against the plaintiff and his sureties in the bond for the amount of the verdict. There were two sureties, but Thomas alone sues out the writ of error, which writ recites a judgment against Thomas in favor of Wyatt. The record returned shows a judg-

ment against Thomas and Lansdale and Bryan as sureties. It is immaterial in what character Lansdale and Bryan became parties to the judgment. It is against the three parties as a joint judgment, and of course they should be joined in the writ of error."

See *Whitworth v. Carter*, 41 Miss. 640, wherein a review of the Mississippi decisions is had.

See also: *Green v. Bank*, 3 How. (Miss.) 43; *Duvall v. Cox*, 5 How. (Miss.) 12; *Barker v. Wanzer*, 5 How. 290; *Flournoy v. Burke*, 4 How. 337; *Henderson v. Wilson*, 4 S. & M. 732; *Preira v. Silver*, 4 S. & M. 735; *Hoggatt v. Ferrell*, 41 Miss. 643; *Sellers v. Smith*, 39 So. 356.

II.

NO FEDERAL QUESTION IS SHOWN TO BE INVOLVED IN THIS SUIT—

(a) Defendants in error, in good faith, under contract of purchase, cut the timber, and thereupon plaintiff in error, by force, wrongfully deprived them of the possession.

"In what way did they take it from you, by force or not?" A. "By force. We wasn't willing to give it up; came there with a high sheriff from Phillips county; we were satisfied we were right, but when the high sheriff come, couldn't help it."

It appears, furthermore, that this "high sheriff" from Phillips county at this time was within the State of Mississippi and exercised wrongfully his pretended authority against these ignorant negroes, so that the circuit court very properly gave an instruction devolving upon plaintiff in error the proving of a title, to justify it if could, its wrongful forcible deprivation of the ignorant colored men. (Record, 160).

Now, under the laws of Arkansas, the ownership of plaintiff in error extends only to high water mark. The bed of the stream is public property, whereof the state is trustee.

Johnson v. Quarles, 182 S. W. 283;

Cisna vs. Tenn., supra.

Kinnanne v. State, 106 Ark. 283.
Arkansas v. Tennessee, Original No. 4.

Plaintiff in error, under the agreement, Record, page 7, has his title admitted "to Sections 22 and 23," Township 4, Range 4 East, Phillips County, which in the plat annexed to the record is shown to contain, Section 22, 56.53 acres; Section 23, 12.07 acres, making a total of 68.60 acres.

Plaintiff in error is shown to have paid taxes on Section 22, containing 56.53 acres on a basis of $55.00, and on Section 23, containing 12.33, on a basis of $15.00 in 1895 (Record, page 98), and to have paid taxes in 1896, upon the same land upon a basis of $70.00 valuation; and in 1897, upon a basis of $70.00 valuation; in 1898, upon the same valuation, and we call attention to a misprint in the record (Record 102), wherein the original state record shows 56.33 while the record here purports to show 656.53, which is an error and should be corrected.

In 1898 the same taxes were paid upon the same acreage; in 1899, the same acreage was paid on, but the valuation was raised to $135.00, which valuation continued to be paid on in 1903, and in 1904 the valuations were increased to $275.00, which valuation continued in 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, Record 98 to 120 inclusive.

Now, payment of taxes is a strong evidence of a claim of title, and a failure to pay is evidence of a want of any right or claim to the property.

Haltzman v. Douglass, 42 L. Ed. 466, quoted in *McCaughan v. Young,* 85 Miss. 293.

With this burden upon the appellant, its right of property terminated at the high water mark, under the decisions of the Arkansas court, which are conclusive upon this question.

Arkansas v. Tennessee, Original No. 4; *Archer v. Gale,* 233 U. S. 68; *Packer v. Byrd,* 137 U. S. 661; *St.*

Louis v. Reetz, 138 U. S. 242; *Kauna v. Canal*, 142 U. S. 271; *Shiveley v. Bowlby*, 152 U. S. 44; *Hardin v. Jordan*, 140 U. S. 371; *Transportation Co. v. Mobile*, 187 U. S. 482. Cisna v. Tenn., supra.

As to the Arkansas law, see:

Arkansas v. Tennessee, supra; R. R. Co. v. Ramsey, 8 L. R. A. 557; *Borough v. Boyle*, 108 S. W. 379; *Polack v. Stankey*, 100 Ark. 36; *Johnson v. Quarles*, 182 S. W. 283; *Southern Sand Co. v. Attorney General*, 180 S. W. 219; *Session Laws Arkansas* 1892, page 207. Cisna v. Tenn., supra.

The statement made in the petition for the writ of error that this case involved the boundary line between the State of Mississippi and the State of Arkansas, is erroneous. The right of plaintiff in error terminated at the high water mark on the Arkansas shore in 1848, and did not reach to the thread of the stream, which was the boundary between Arkansas and Mississippi at that date, and which, by reason of there having been at that date an avulsion, has remained fixed from that time to this.

Arkansas v. Tennessee, supra; Nebraska v. Iowa, 143 U. S. 361; *Shiveley v. Bowlby*, 152 U. S. 1; *Missouri v. Nebraska*, 196 U. S. 23; *New Orleans v. United States*, 10 Peters 662; *Missouri v. Kentucky*, 11 Wall., 395; *St. Clair County v. Lovington*, 23 L. R. A. 63; *Stackley v. Cissna*, 119 Tenn. 152; 119 Fed. 812; *Hearn v. State*, 181 S. W. (Ark.) 295, approving *Tennessee v. Pulp Co., supra; Tennessee v. Pulp Co.*, 119 Tenn. 56; approved in *Kinnanne v. State*, 106 Ark., distinguishing *Butterworth v. Bridge Co.*, and *Iowa v. Illinois*, 147 U. S. 1. Cisna v. Tenn., supra.

Reliance was placed before the supreme court, upon the decision of this court in *Cissna v. Tennessee*, 242 U. S. 243, but there the question between plaintiff and defendant was as to the line between the states, not a question where the plaintiff in error's title stopped at high water mark, and did not come, therefore, in conflict with the title of the defendant in error which ex-

tends, under the laws of the State of Mississippi, to the thread of the stream.

Morgan v. Reeling, 3 S. & M. 397 (leading case) *Commissioners v. Withers,* 29 Miss. 33; *Magnolia v. Marshall,* 39 Miss. 109; *R. R. Co. v. Frederick,* 26 Miss. 9; *Boone v. Dixon,* 77 Miss. 592; *Archer v. Greenville,* 233 U. S. 68.

In the motion for a re-hearing, in the supreme court of Mississippi, plaintiff in error pressed the court for a written opinion on this very ground. The statute of the State of Mississippi requires the supreme court to render a written opinion, code 1906, section 4918.

> "4918 (4352) *What opinions be in writing.*—In all cases settling important principles, in cases to be remanded, and in all cases where the judgment or decree of the court below is reversed, the opinion of the supreme court shall be in writing stating the reasons upon which the decision is made; and the opinion shall be recorded by the clerk in a well-bound book to be kept for that purpose."

So that, this case was decided by Mr. Justice Potter, who did not think it decided any important principle, and later decided by Justice Stevens, who did not think it decided any important principle; and let it be noted that this writ of error was not obtained from the Mississippi supreme court, but was obtained from the justices of this court upon the statement made in the petition for writ of error, that

> "It is conceded that the lands involved in this cause, in which a writ of error to the supreme court of Mississippi is prayed by your petitioner, are the same lands that are involved in the suit pending in this honorable court, known as the *State of Arkansas v. State of Mississippi,* and the decision of this latter case by this honorable court will determine the boundary line between the two states *and the title of your*

petitioner to the land in question in this cause; and if the claim of your petitioner is sustained, the decision of the supreme court of Mississippi in this cause should be reversed (Record 183). Italics ours.

With deference we submit that there is no such concession. A decision of the case of *Arkansas v. Mississippi* will establish a line that is distant at least half a mile (the Mississippi is about a mile wide at this point) from the line that is in controversy in the present case, so far as any record has been introduced showing title in plaintiff in error.

That the supreme court of Mississippi did not consider the boundary line is absolutely demonstrable from its action in overruling the plaintiff in error's petition for a written opinion (See, especially, Record, page 174). There the plaintiff in error set up the necessity of a written opinion if this point was to be decided, and in said petition set forth:

> "It is, therefore, essential, in order for appellant to present its case to the supreme court of the United States, for it to know what was decided in order that it may ascertain to what extent the question of the boundary between the states was considered adjudicated. That this court will thus accord it the opportunity to have its day in court, this appellant cannot doubt."

Hence, when, under section 4918, no written opinion was rendered, it was self-evident that the reason therefor was that the supreme court of Mississippi accepted the contention of the appellee, defendant in error here, that the boundary line between the two states was not involved.

This is further made manifest by the fact that plaintiff in error made a motion to continue this cause (Record 178) upon this ground, which being uncontested was sustained, there having been, as recited in the motion to set aside the continuance (Record 179), no notice re-

ceived of said motion by counsel for appellee, (it being the practice of the Mississippi court in matters of this character to grant such motions as of course when not contested).

But there then came on a motion to set aside the continuance (Record 179), the principal predicate of which is contained in the third ground, showing there was no federal question involved, and the continuance was thereupon set aside and the cause remanded to the docket, and affirmed without an opinion.

The effect of such affirmance is well stated in *Power Co. v. Realty Co.*, 244 U. S. 303, where this court said:

> "It is contended that, 'Conceding the existence of federal questions in the case, nevertheless as there were independent state grounds broad enough to sustain the judgment, there is no jurisdiction.' We think the contention is sound."

Here the supreme court of Mississippi declined to write an opinion because it held that no important question was decided, and, therefore, its holding is conclusive upon this court.

Again, as said in the same case:

> "But assuming that we are not controlled by the statement of the supreme court of Ohio on this subject, and must determine it upon our own conception as to what was done by the court whose judgment is under review, the result would be the same. We so conclude because, looked at from the point of view of the action of the trial court and of the court of appeals, the case presents the single question of what principle is to be applied where, from an absence of an opinion expressed by the court below, it is impossible to say whether its judgment was rested upon state questions adequate to sustain it independent of

the federal questions, both being in the case. But the rule which controls such a situation has long prevailed and was clearly expressed in *Allen v. Arguinbau,* 198 U. S. 149, 154, 155, 49 L. Ed. 990, 993, 25 Sup. Ct. Rep. 622, where a writ of error to the supreme court of Florida was dismissed as follows: 'The supreme court of Florida gave no opinion, and, therefore, we are left to conjecture as to the grounds on which the pleas were held to be bad; but if the judgment rested on two grounds, one involving a federal question and the other not, or if it does not appear on which of the two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this court will not take jurisdiction. *Dibble v. Bellingham Bay Land Co.,* 163 U. S. 63, 41 L. Ed. 72, 16 Sup. Ct. Rep. 939; *Klinger v. Missouri,* 13 Wall. 257, 20 L. Ed. 635; *Johnson v. Risk,* 137 U. S., 300, 34 L. Ed. 683, 11 Sup. Ct. Rep. 111; *Bachtel v. Wilson,* 204 U. S. 36, 51 L. Ed. 357, 27 Sup. Ct. Rep. 243; *Adams v. Russell,* 229 U. S. 353, 57 L. Ed. 1224, 33 Sup. St. Rep. 846.

Dismissed for want of jurisdiction."

Also *Allen v. Arguinbau,* 198 U. S. 155; *Dibble v. Bellingham Bay Land Co.,* 163 U. S. 63; *Klinger v. Missouri,* 13 Wall. 257.

And so, with the utmost deference, we submit that not only might the judgment of the supreme court of Mississippi have been based upon the ground that the plaintiff in error proved title to no more land than that bounded by the high water mark at the time of the avulsion, and hence have defeated the jurisdiction of this court, but that said court did, in fact, so place its decision, and did, in fact, decide nothing but the extent of ownership of plaintiff in error, which embraced, with deference we submit, only the seventy odd acres upon which it was paying taxes, and, with confidence we submit that being the case, the supreme court of the

State of Mississippi could very well have applied the maxim *allegans suam turpitudinem non est audiendus*

An examination of the briefs in the supreme court of Mississippi will bear out these statements as to the basis of this decision.

III.

(b) The land in question was between the two levees and seems to have been subject to overflow—in fact the water brought the logs in question off when it came up. There was ample testimony of possession by these defendants in error of the property in question and of the doing by them of all acts of ownership whereof said land was capable. This would, as to this character of land have started the statute of limitations. *McCaughan v. Young,* 85 Miss. 293. With the right to determine the ownership upon this ground of adverse possession, there is no right to assign error here. The decision below is conclusive. *Railroad Co. v. Brewer,* 231 U. S. 249; *Donohue v. Vosper,* 243 U. S. 65; *Oil Co. v. Texas,* 212 U. S. 112. Wherefore as the decision could, by the supreme court have been placed upon this ground, the judgment should be affirmed.

(c) There is ample testimony in the record as to the location of the river a short time after the avulsion upon which to have based a decision for the defendants in error—how Pecan Lake was formed is testified expressly—this witness could have been cross examined and his testimony was for the jury; they evidently found it to be true. It will be seen that the plaintiff in error did not in the circuit court of Coahoma county treat the case as one in which that court could take judicial knowledge of the location of the line between the property of the several parties to this suit—on the contrary, the several parties tried the case not upon the judicial knowledge of the court, but upon evidence introduced. This was the way in which the matter was settled and it would not now be competent for the plaintiff in error, when the court has found his witnesses were not credible, when there was no motion for a continuance to say

that notwithstanding the course pursued by each of the parties in the trial of this case, that the court knew where the line was and should have decided the case upon what it knew and not what the plaintiff in error failed to prove. If the plaintiff in error wanted the case to be determined upon judicial knowledge, he should have so tried it below. He cannot try the matter there upon one theory, and losing, then set up another. *Communis error facit jus* under the decisions of the supreme court of Mississippi, and this being a local rule of law, error would not be predicable here thereof. *New Orleans, etc., Railroad v. Cole,* 101 Miss. 179; *Clisby v. Railroad Co.,* 78 Miss. 937. We challenge counsel to show any point in this record where there was a reliance upon judicial knowledge, the entire question was decided as one of fact. Being a question of fact, the jury were justified in deciding as they did and their decision is not reviewable here.

The Plaintiff in Error got far more in its instructions than it was entitled to—it applied the doctrine of accretion after the avulsion contrary to *Arkansas v. Tennessee* and numerous other cases. But notwithstanding the jury found for the defendants in error. In said instructions (R. 160, 161, 162) there is no hint of there being a Federal question in this case. The sole question is one of fact which under these instructions was to be and was decided by the jury.

No Federal question is shown to have been involved, because there was no opinion rendered by the State Supreme Court herein.

In addition to the citation of principles just covered, with deference we submit that the right of Defendants in Error and Plaintiffs in Error do not involve in any way the boundary between Arkansas and Mississippi.

It appears that the burden of proof was upon Plaintiff in Error. It furthermore appears that the Plaintiff in Error had to show title.

Now, in addition to not proving title below high water mark, it appears that the *locus in quo* was between the Arkansas and the Mississippi levees; and it furthermore appears that in truth and in fact a large part of the land was actually surveyed as a part of the State of Mississippi, and some of the actual cutting was upon land actually surveyed in Mississippi.

Note map of Plaintiff in Error showing the survey of Lot 1, Section 11, Coahoma County. The alleged trespass covered only 27.80 acres, and that a part of this was actually surveyed as Mississippi in 1833. But, as shown *supra*, the title of the Defendant in Error extended to the thread of the stream, and upon this the decision of the Supreme Court of Mississippi would be final, and upon any of said grounds the Supreme Court could have rested its judgment, and if it were so possible to have rested it, then, with deference, we submit that the Writ of Error should be dismissed, or, if entertained, affirmance entered, as hereinafter set forth. Authorities *supra*.

IV.

No Federal question was properly raised at the proper time.

With deference we submit that the only attempt to raise a Federal question was in the Petition for a written opinion, and for a re-argument, which is too late, under the universal practice on this behalf. *Meyer v. Richmond*, 172 U. S. 92; *Turner v. Richardson*, 180 U. S. 92.

V.

Said record containing no evidence to show where said line was between the States of Mississippi and Arkansas in 1848, the said Supreme Court was without power to reverse said decision of the Circuit Court, and if said decision is to be reversed it can be done only upon a Writ of Error directed to said Circuit Court of Coahoma County, not to the Supreme Court of the State of

Mississippi, whose jurisdiction is conditioned upon the error appearing in the record, and whose jurisdiction is limited strictly to that of a Court of Appeals.

The record herein fails to locate the boundary line between Mississippi and Arkansas in 1848.

The Circuit Court of Coahoma County was the Court of primary instance, and the power of the Supreme Court of Mississippi was limited and confined strictly to affirming or reversing the judgment of the Circuit Court of Coahoma County. Under Section 146 of the Constitution, said Court had only such jurisdiction as properly belongs to a Court of Appeals.

Now in the Circuit Court of Coahoma County no motion was made for a continuance of this cause until there should have been an adjudication in *Arkansas v. Mississippi.* No attempt was made to make the decision in this Court in that cause conclusive or binding.

The Supreme Court of Mississippi was presented with the record in which both parties had submitted their contentions to a jury, and each party had introduced what he contended to be all of the pertinent evidence, and this evidence was passed upon by a jury and the jury held that the facts were with the Defendants in Error.

Now it is held in *Boone v. McJunkin,* 63 Miss. 559:

"We know of neither an authority nor a principle upon which we can try on appeal the existence of a fact which has arisen since the judgment in the court below, or upon which the alleged fact, if now found to be true, would warrant a reversal of a judgment right when it was rendered. This Court can only reverse a case erroneously determined by the inferior court; a judgment right when rendered is not subject to reversal because of any fact arising after its rendition, and

which, if it had existed at the time, would have produced a different result."

Now the law in Mississippi is well settled that *communis error facit jus.*

Having tried this case upon this evidence without any reference to the judicial knowledge of the Court, even if this were available, the Plaintiff in Error cannot complain.

There is not the slightest pretense made to locate the steam boat channel at the date 1848. If, as was then the case, the shortest channel was sought, then said channel would surely have been close to the Arkansas shore. But the parties tried out this case on the theory that the shore lines were controlling factors, and Plaintiff in Error did not introduce a single solitary witness who attempted to prove where the steamboat channel was, even conceding this was a material factor.

In the absence of such proof, the presumption is that it was midway between the shores, and in such a case this presumption would give all of the area to the Defendants in Error.

Arkansas v. Tennessee, supra;
Iowa v. Illinois, supra.
State v. Keane, 84 Mo. App., 130;

Here each party introduced in the Circuit Court everything that was pertinent; everything that he desired to introduce, and the case was fought out without reference to any Federal question; and now after the case has been so decided upon full evidence introduced, then to attempt to inject a Federal question is, we submit, impossible when a proper predicate therefor has not been laid.

VI.

But should we be in error in all of the foregoing,

and this Court should assume jurisdiction as having been properly obtained upon the Writ of Error, then we submit:

(1) There are ample grounds shown by the record, independently of such Federal question, upon which the Supreme Court of Mississippi could, and did, in fact, place its decision, embracing—

(a) The fact that Plaintiff in Error did not have title to the State boundary line.

(b) That possession of Defendants in Error gave them title as against all parties save the State of Arkansas.

(c) That Plaintiff in Error was without right as against Defendants in Error, irrespective of the sovereignty of the States in the premises.

(d) Adverse possession.

(e) The *communis error* doctrine.

Now, these points have been covered, *supra,* upon the motion to dismiss, and are only referred to so as to present a consistent whole.

(2) Because both the Supreme Court of the State of Arkansas and the Supreme Court of the State of Mississippi have fixed upon the same thread of the stream as a dividing line, which will be conclusive upon this Court.

It appears that under the decision of this Court in *Iowa v. Illinois,* 147 U. S. 1, reaffirmed in *Arkansas v. Tennessee,* that the middle of a river is to be fixed along the middle of the deepest channel, but as was said by Mr. Cresey, *prima facie* the middle of the stream between the two high banks is the boundary line unless it is proved that the navigable channel which vessels habitually use is elsewhere. In this case there is no such proof.

Under the law of the State of Arkansas, the decision made as to the navigable channel, as contradistinguished from the middle of the stream, is not recognized, and in both Arkansas and Mississippi, the dividing line is held to half way between the fixed and permanent banks of the stream.

The leading case upon this point in Arkansas is *Sessell v. State,* 40 Ark. 501, wherein the Mississippi case of *Morgan v. Redding,* 3 S. & M. 697, is quoted with approval, and the decision in the instant case is an approval by the Supreme Court of Mississippi of the doctrine therein contained.

See, also, *Delaney v. State,* 88 Ark. 311,

Wolfe v. State, 104 Ark. 143,

and the leading case of *Tennessee v. Pulp Co.,* 119 Tenn., 47, is approved and quoted from; 181 S. W. 295; and also in *Kinnaire v. State,* 106 Ark. 113.

We, therefore, with deference submit that the dividing line between Arkansas and Mississippi could not have been further west at this point than the middle of the Mississippi River as fixed by the banks upon each side, notwithstanding the opinion in *Arkansas v. Tennessee.*

Now, it appears that the river here is about a mile wide; and it furthermore appears by a fixation of this as the width, that the locus of the trespass could not have occurred in Arkansas.

Lot 1 (One) is accurately located, and it appears from the evidence that in 1857 there was an overflow in the month of July, whereunder there was a break in the levee and the formation of Pecan Lake,—at least the jury were so warranted in finding it.

Under no possible theory could the steamboat channel as attempted to be delineated upon the exhibits for

Plaintiff in Error, be fixed as the boundary, because—

(a) The Supreme Court of Mississippi and the Supreme Court of Arkansas have not adopted this as the true boundary line, and it is only when there is a contrariety of judicial decision that this Court is called on to make an adjudication. Where both States acquiesce in the fixation of a boundary, then that line becomes the boundary and is conclusive of all persons.

(b) But the record here wholly fails to disclose the location of the steamboat channel, even admitting that it has any bearing upon the instant case, and, therefore, under *Iowa v. Illinois*, 147 U. S. 1, the boundary line is fixed as midway between the two shores, there not being any evidence to overcome the *prima facie* presumption there shown to exist under the authorities. No witness now alive can testify and no records were shown.

With this as a boundary, Plaintiff in Error could have no case, even though his ownership should extend beyond the high water mark, which it did not.

(3) The map introduced by Calhoun is very inaccurate as to the location of the island which is shown upon the plat made in 1817 when Arkansas was surveyed.

It will be seen that at this date this island was in the middle of the Mississippi River and most likely the thread of the stream ran to the north of it.

Furthermore, it was not surveyed at that time as a part of the State of Arkansas. That is certain.

Now the survey of Mississippi occurred in 1833 and shows no island formation whatsoever.

Now it is entirely possible that this island has never been surveyed and that it is still un-surveyed and for that reason it is a part of the State of Mississippi, because if the Government had intended the land to be a part of Arkansas it would at that time have surveyed said island, as a part and parcel of Sections 22 and 23, and have given

to Sections 22 and 23 a greater acreage than 56.33 and 12.09 acres. In short, this island, as such, in 1817, would have constituted a part of these two sections, and yet when the area of the sections is given, it does not appear to contain any of this acreage; and, therefore, with deference we say that the true boundary between Arkansas and Mississippi was mid-way between the two banks of the river, and given that factor, Plaintiff in Error's case vanishes.

(3) That in this record seeking to reverse the judgment of the Circuit Court of Coahoma County, there is no proof whatever as to where the line was in 1848 at the time of the avulsion, and the burden of proof being upon the Plaintiff in Error, judgment final should have been directed for the Defendant in Error for want of sustaining proof.

Now Plaintiff in Error having the burden of proof has failed to show the line in 1848, and the burden of proof being upon Plaintiff in Error, with deference we submit that judgment final could have been rendered on a peremptory instruction for Defendants in Error, and that there was no proof whatever by the Plaintiff in Error which would have in any wise entitled him to relief under the foregoing facts.

(4) The evidence shows that the correct line put all of the land on which this timber was cut, within the State of Mississippi wholly irrespective of any Federal question.

With deference we submit the entire parcel of land here in controversy is, as heretofore shown, within the State of Mississippi, without any necessity for the application of the doctrine of what may be established in the case of *Arkansas v. Mississippi.*

(5) The Supreme Court of the State of Mississippi was without authority to reverse the judgment of the

Circuit Court of Coahoma County, Mississippi, unless it affirmatively appeared that there was error in said record.

With deference, as hereinbefore pointed out under the *McJunkin* case, 63 Mississippi, the Supreme Court of Mississippi, was without authority to reverse this judgment.

Respectfully submitted,

GEORGE F. MAYNARD,
GERALD FITZGERALD,
Clarksdale, Miss.,
MARCELLUS GREEN,
GARNER WYNN GREEN,
Jackson, Miss.,
Attorneys for Defendant in Error.

I hereby certify that I mailed, postage prepaid, by registered letter, to Mr. Herbert Pope, on April..... 1918, to his postoffice address, Monadnock Building, Chicago, Ill., a true copy of this brief, this April..... 1918.

GARNER W. GREEN,
Of Counsel for Defendants in Error.

8.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1917.

No. [redacted] 171

RUST LAND & LUMBER CO.,
Plaintiff in Error,

vs.

ED JACKSON, ET AL.,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF MISSISSIPPI.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS OR AFFIRM.

HERBERT POPE,
Attorney for Plaintiff in Error.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

SUBJECT INDEX.

BRIEF AND ARGUMENT.

List of Cases Cited.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1917.

No. 471

RUST LAND & LUMBER CO.,
Plaintiff in Error,

vs.

ED JACKSON, ET AL.,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF MISSISSIPPI.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS OR AFFIRM.

Plaintiff in error respectfully submits that, in accordance with the decision of this court in *Cissna* v. *Tennessee,* 242 U. S., 195, the disposition of this motion to dismiss or affirm should be continued until the final hearing, and that this cause should be set for final hearing at the same time as or after the hearing in the case of *Arkansas* v. *Tennessee,* No. 6 original, now pending in this court. The case at bar presents a situation which, in all material respects, is identical with that presented in the case of *Cissna* v. *Tennessee, supra,* as will appear from a short statement of the facts in the case at bar. These material facts are not stated in the so-called "Statement of the Case" contained in the brief for defendants in error.

STATEMENT.

This replevin suit was commenced in the Circuit Court of Coahoma County, Mississippi, and was submitted to a jury under instructions by the court (Rec., 160-162), which made the success of the plaintiffs (defendants in error here) or of the defendant (plaintiff in error here) depend upon a determination under the evidence submitted of the question whether the land on which the timber in controversy was cut was located in the State of Mississippi or the State of Arkansas. The rights of the parties under the instructions of the court were made to depend upon the ownership of the land in question, and this ownership in turn depended upon whether this land was found to be in the State of Mississippi or the State of Arkansas.

It was stipulated and agreed between the parties that the title to Lots 1 to 9 inclusive of Section 11, Township 28, Range 5 West, in the County of Coahoma and State of Mississippi, is vested in certain persons from whom defendants in error had authority to cut timber on said lots; that the title to Section 22 and Section 23 in Township 4 South, Range 4 East in Phillips County, Arkansas, is vested in plaintiff in error. (Rec., 23.) The land referred to as belonging to plaintiff in error is located on what is known as Horseshoe Island, and the land in question in this case is also located on Horseshoe Island and adjoins this land on the south. The Mississippi lots referred to as belonging to the persons under whom defendants in error claim are separated from the land in question in this case by a body of water known as Old River or Pecan Lake which is now about 900 feet in width. (Rec., 54 and maps.) The question in litigation in this

cause is whether the land on which the timber in controversy was cut is located in the State of Mississippi, and was formed by accretions to the Mississippi shore, or is located in the State of Arkansas and belongs to plaintiff in error.

The Circuit Court shifted the burden of proof from the plaintiffs to the defendant and then instructed the jury (Rec., 160) that "it devolves upon the defendant to show, by a preponderance of the evidence that it is the owner of the land from which the timber was cut before defendant can recover in this case," and also:

> "That unless the Rust Land Company has shown to the satisfaction of the jury, by a preponderance of the evidence, that the lands from which the timber in controversy was cut was a part of the accretions to the land belonging to the Rust Land Company in the State of Arkansas, or was north and east of a channel of the Mississippi River where the cut-off 1848 occurred, then they will find for the plaintiffs."

The cut-off of 1848 referred to in this instruction involved the making of a new channel by the Mississippi River, which in that year cut across the points of a horseshoe-shaped channel formed by the old course of the river, and left an island known as Horseshoe Island between the old and new channels. The old channel, however, still contained, after the cut-off, a considerable body of water, continued to be a navigable channel (Rec., 157), and some parts of what is known as Old River still contain water of a considerable depth which is at some points several hundred yards in width. (Rec., 54.)

The court further instructed the jury (Rec., 161),

> "that if they believe from the evidence that the body of water shown on the maps introduced in evidence in this case, and called Old River or Pecan Lake is between the Mississippi shore and the land on which the timber in controversy in this suit was growing, and that this body of water was the last channel of

> the river as it dried up between the island and the shore of Mississippi, and that the said lands on which the said timber was growing, is not attached to the Mississippi shore or any accretions formed or attached thereto, then the jury will find for the defendant."

Under this instruction it was necessary that the jury should find from the evidence that the land in question was located in the State of Mississippi in order to find for defendants in error. If, on the other hand, they found that the land was not in Mississippi, they must find for plaintiff in error.

The instructions of the trial court were intended to state the rules of law which govern the determination of the boundary line between two states, under the rule stated by this court, when an avulsion has occurred in the river forming such boundary line, and a new channel has been formed; but the instructions given obviously do not state the rule governing such a case as it has been stated and applied by this court.

The jury returned a verdict for the plaintiffs (defendants in error here) and the judgment entered provided as follows (Rec., 164):

> "It is therefore ordered and considered by the court that the defendant restore to the plaintiffs (naming them) the property levied on herein and in default thereof that said plaintiffs do have and recover of the defendant, the Rust Land & Lumber Company, and the United States Fidelity & Guaranty Company of Baltimore, Md., the sureties on their bond, the sum of thirty-six hundred ($3,600) dollars and all costs in this behalf expended for which execution may issue."

An appeal was taken to the Supreme Court of Mississippi by the defendant, Rust Land & Lumber Company, and an appeal bond was given with the United Casualty & Surety Company as surety. No appeal was

taken by the United States Fidelity & Guaranty Company, the surety on the replevin bond in the Circuit Court.

On March 6, 1916, while this cause was pending in the Supreme Court of Mississippi, the plaintiff in error, the Rust Land & Lumber Company, made the following motion (Rec., 178):

"Comes Rust Land & Lumber Company, appellant, and moves the court to continue this case and stay the trial thereof until a certain cause pending in the Supreme Court of the United States, No. 6, Original, on the docket thereof, styled *State of Arkansas* v. *State of Mississippi*, is determined by that tribunal, and for cause of said motion shows as follows:

The issue in controversy in this case is the boundary lines between the State of Arkansas and the State of Mississippi, the appellees claiming under a grant from the State of Mississippi and the appellant claiming under a grant from the State of Arkansas. So that, the real question involved in this case, determinative of the rights of the parties, is the true boundary line between the said states at the place from which the timber involved in this suit was cut.

There is pending in the Supreme Court of the United States, and ready for the taking of testimony therein, said cause between the States of Arkansas and Mississippi, which involves only the true boundary line between said states at the very point in controversy in this suit, so that, a determination of the boundary line by the Supreme Court of the United States, which has the final jurisdiction thereof, will determine the boundary line between said states, and whether the land involved is in the said State of Arkansas, as claimed by appellant, or in the State of Mississippi, as claimed by appellees is the basis of contention in this case.

Wherefore appellants move the court to stay the trial of this action until the determination of said boundary at the very point in controversy in this case, until such determination by the Supreme Court of the United States has been made.

In support of said motion, appellants file here-

with a copy of the original bill in the Supreme Court of the United States, and a copy of the motion for the appointment of a commissioner and a stipulation for the taking of proof therein."

This motion was at first sustained and the cause continued, but subsequently, on motion of attorneys for defendants in error (Rec., 179, April 7, 1916), the continuance was set aside and the cause was placed on the docket for call at the October term. (Rec., 180.)

Subsequently, on December 23, 1916, the Supreme Court of Mississippi affirmed the judgment of the Circuit Court without an opinion. (Rec., 171.) Counsel for plaintiff in error thereupon filed a petition for rehearing (Rec., 171-175) in which the attention of the Supreme Court of Mississippi was again called to the fact that the decision of the court necessarily involved a decision of the boundary-line question between the States of Mississippi and Arkansas, and that that question was then pending for final determination in this court in a case between the two states. The attention of the court was also called to the decision of this court in *Cissna* v. *Tennessee, supra,* and it was pointed out that even this court did not consider that it should decide a private suit involving the boundary between two states while another case between the two states was then pending in this court which involved the determination of the same boundary question. (Rec., 175.)

This motion for rehearing was denied by the Mississippi Supreme Court, and the court also denied a motion that it file a written opinion in the case. (Rec., 179.)

A petition for a writ of error from this court to the Supreme Court of Mississippi was then presented to this court and the writ issued. (Rec., 191-192.)

The judgment entered in the Supreme Court of Mis-

sissippi recites that the court having examined the record in this cause, "and *being of opinion that there is no error therein* doth hereby order and adjudge that the judgment of said Circuit Court rendered in this cause at the December term, 1913, on the 3rd day of December, 1913, *be and the same is hereby affirmed.*" The judgment then goes on to provide "that appellees do have and recover of appellant and the *United States Casualty Company,* surety in the supersedeas bond, the sum of thirty-six hundred ($3,600) dollars," etc. (Rec., 171.)

The surety in the supersedeas bond was in fact the United Casualty & Surety Company. (Rec., 166.) The United States Casualty Company was not a party to the record in any capacity and the judgment against it, to whatever error it may be due, must, as will be shown, be treated as a nullity on this record. There is no judgment shown in this record against the United Casualty & Surety Company, the surety on the appeal bond, and even if the record were made to show such a judgment, we contend that it would not be a necessary party to this writ of error.

As to the third surety company mentioned in the record—the United States Fidelity & Guaranty Company, the surety on the replevin bond in the Circuit Court—the Supreme Court of Mississippi has necessarily held, as we shall show, that it was not a necessary party to the appeal to that court, and if this is so it is, as we shall contend, not a necessary party to this writ of error.

BRIEF OF ARGUMENT.

I.

NONE OF THE SURETY COMPANIES MENTIONED IN THE RECORD IS A NECESSARY PARTY TO THE WRIT OF ERROR.

1. *The United States Fidelity & Guaranty Company —surety on the replevin bond in the Circuit Court—was not a necessary party to the appeal from the Circuit Court of Coahoma County to the Supreme Court of Mississippi, and is not a necessary party to the writ of error from this court to the Supreme Court of Mississippi.*

The judgment in the Circuit Court is a judgment, first, that the Rust Land & Lumber Company restore to the plaintiffs the property levied on, and, second, and in default thereof, a judgment that the plaintiffs recover of the Rust Land & Lumber Company and the United States Fidelity and Guaranty Company a sum of money specified.

This judgment is not only in terms a several judgment, but the Supreme Court of Mississippi recognized the right of plaintiff in error to a separate appeal by affirming the judgment in this case.

The Supreme Court of Mississippi has recently held that a surety on a bond in the trial court is not a necessary party to an appeal by the principal from a judgment against both, though the supersedeas inures to the benefit of the surety as well as the principal.

Jayne v. *W. B. Nash Lumber Co.*, 66 So. R., 813.

Other courts have held the same in such cases.

The New York, 104 Fed., 561. (Opinion by Judge Lurton.)

The Glide, 72 Fed., 200.
Love v. *Export Storage Co.*, 143 Fed., 1, 11.
Wren v. *Peel*, 64 Tex., 374.
Henry v. *Whitehurst*, 64 So. Rep. (Fla.), 233.

In such case the surety continues to be a surety after the judgment is rendered.

Newell v. *Hamer*, 4 How. (Miss.), 684.

This court has also held that where the judgment is distributive, as in the case at bar, a separate appeal or writ of error is maintainable.

Estis v. *Trabue*, 128 U. S., 225, 229.

2. *No judgment appears in this record against the United Casualty & Surety Company, surety on the appeal bond, and even if the judgment in the Supreme Court of Mississippi were against that surety company instead of the United States Casualty Company, the United Casualty & Surety Company would not be a necessary party to the writ of error.*

The judgment against the United States Casualty Company—not a party to the record—must be treated as a nullity.

Overstreet v. *Davis*, 24 Miss., 393.

The judgment in the Supreme Court of Mississippi is, in any case, a several judgment in terms against plaintiff in error.

Estis v. *Trabue*, *supra*.
The New York, *supra*.
Winters v. *United States*, 207 U. S., 564.

See also:

Inland & Seaboard Coasting Co. v. *Tolson*, 136 U. S., 572.

The Mississippi Supreme Court holds that a separate appeal by the principal is maintainable in such cases.

Jayne v. *W. B. Nash Lumber Co.*, 66 So. Rep., 813.

The reason for the rule that all parties to a joint judgment must be joined in the writ of error does not apply in such cases.

Hardee v. *Wilson*, 146 U. S., 179.

Evans v. *Stone & Brick Co.*, 20 Wyo., 188.

If it should be held that the surety in the appeal bond is a necessary party to the writ of error, then leave is hereby asked to amend the writ by inserting the name of the surety.

Inland & Seaboard Coasting Co. v. *Tolson*, *supra.*

II.

A FEDERAL QUESTION IS SHOWN TO BE INVOLVED BY THE RECORD IN THIS CASE.

1. *The decision of the Mississippi Supreme Court involved an erroneous determination of the boundary line between the States of Mississippi and Arkansas.*

Cissna v. *Tennessee* (decided by this court March 11, 1918).

(a) The contention of counsel for defendants in error that the Supreme Court of Mississippi might have affirmed the judgment of the Circuit Court on the ground that plaintiff in error is not entitled to accretions to the Arkansas shore in Arkansas after the avulsion in 1848 cannot be sustained on this record.

Moreover, it will not be assumed, in the absence of an opinion, that the Mississippi Supreme Court adopted an erroneous rule of law.

The usual rule as to accretions is the law of Arkansas and there is no case holding that it does not apply on an old channel after an avulsion.

See:

Nix v. *Pfeifer*, 73 Ark., 199.
Cooley v. *Golden*, 117 Mo., 33.
Benecke v. *Welsh*, 67 S. W. Rep. (Mo.), 604.

(b) The judgment could not have been affirmed on this record on the ground of adverse possession of the land by defendants in error.

(c) There has been no action by the courts of Arkansas and Mississippi which could make the boundary line a line equally distant from the shore lines instead of the middle of the navigable channel.

State of Arkansas v. *State of Tennessee* (decided by this court March 4, 1918).

2. *The decision of the Supreme Court of Mississippi denied the federal rights of plaintiff in error by overruling its motion that this cause be continued to await the determination of the suit between the States of Mississippi and Arkansas then pending in this court (No. 6 Original) to settle the boundary line between the two states at the point involved in this cause.*

The question of the boundary line not only arises under federal statutes, but can be finally and conclusively settled only by a decision of this court in a case in which the two states are parties which will be binding not only upon such states but upon all persons and all inferior courts. The pendency of such a proceeding presents a question which is peculiarly federal in its nature, and the motion in this cause calling attention to the pending suit in this court necessarily drew in question an authority exercised under the United States.

3. *The boundary question between the two states was a federal question which was raised and decided both in the Mississippi Supreme Court and in the Circuit Court.*

The Mississippi Supreme Court, with full knowledge of the federal nature of the question involved, affirmed the judgment of the Circuit Court.

The Circuit Court was not only bound to, but did in fact in its instructions, take judicial notice of the federal nature of the boundary line question.

A federal question is raised if "such question were necessarily involved in the disposition of the case by the state court."

Kaukauna Co. v. *Green Bay, etc., Canal,* 142 U. S., 254, 269.

ARGUMENT.

I.

NONE OF THE SURETY COMPANIES MENTIONED IN THE RECORD IS A NECESSARY PARTY TO THE WRIT OF ERROR.

Counsel for defendants in error contend that the United States Fidelity & Guaranty Company, the surety on the replevin bond in the Coahoma County Circuit Court, and the United Casualty & Surety Company, the surety on the appeal bond in the Mississippi Supreme Court, are both necessary parties to the writ of error. (Brief for defendants in error, 4-6.)

We contend that neither one of these surety companies is a necessary party to the writ of error, and that the surety company in fact mentioned in the judgment of the Supreme Court of Mississippi—the United States Casualty Company—is not a necessary party either.

1. *The United States Fidelity & Guaranty Company was not a necessary party to the appeal from the Circuit Court of Coahoma County to the Supreme Court of Mississippi, and is not a necessary party to the writ of error from this court to the Supreme Court of Mississippi.*

The United States Fidelity & Guaranty Company was the surety on the replevin bond in the Circuit Court of Coahoma County. The judgment in that court provides as follows (Rec., 164):

> "It is therefore ordered and considered by the court that the defendants restore to the plaintiffs (naming them) the property levied on herein and in default thereof that said plaintiffs do have and recover of the defendant the Rust Land & Lumber Company and the United States Fidelity and Guar-

anty Company, of Baltimore, Md., the sureties on their bond the sum of thirty-six hundred dollars ($3,600) and all costs in this behalf expended for which execution may issue."

This judgment is a judgment, first, that the Rust Land & Lumber Company restore to the plaintiffs the property levied on, and, second, and in default thereof, a judgment that the plaintiffs recover of the Rust Land & Lumber Company and the United States Fidelity and Guaranty Company the sum of money specified.

The judgment—that the Rust Land & Lumber Company restore the property levied on—is a several judgment which entitled the Rust Land & Lumber Company to take a separate appeal to the Supreme Court of Mississippi, and the affirmance of the judgment by that court was necessarily a decision upon this question. Otherwise the appeal should have been dismissed. If this is not so, and the contention of the defendants in error is correct, they can proceed at once against the United States Fidelity and Guaranty Company on the judgment against it without attempting to have this writ of error dismissed.

Not only was the affirmance of the judgment in this case by the Supreme Court of Mississippi a decision that the United States Fidelity and Guaranty Company was not a necessary party to the appeal to that court, but the Supreme Court of Mississippi has expressly held in a very recent case (1914) that a surety on a bond who is made a party to a judgment in the trial court is not a necessary party to an appeal by the principal.

In *Jayne* v. *W. B. Nash Lumber Co.*, 66 So. R., 813, the sureties on an attachment bond in the trial court were not made parties to the appeal by the principal from the judgment in the trial court, although a judgment was

rendered against them in the trial court. The sureties on the attachment bond were also made sureties on the appeal bond in the Supreme Court. That court held that this was an error—that they could not be sureties on the appeal bond because they were parties to the judgment in the trial court, although they were not necessary parties to the appeal taken by the principal, and said:

> "It is true that the sureties have not appealed from this judgment. Neither are they necessary parties thereto; but nevertheless the supersedeas thereby obtained inures as much to their benefit as it does to that of appellant."

The appellant was given thirty days within which to execute another appeal bond.

In the case at bar it is clear that the order contained in the judgment of the Circuit Court for the delivery of the property by the Rust Land & Lumber Company is held in abeyance by the supersedeas and will only become effective after a final determination of this cause. Until there is a final judgment against the plaintiff in error there can be no recovery against the surety in the replevin bond. The surety remains a surety in such case even after the rendition of a judgment against its principal and against itself.

Newell v. *Hamer*, 4 How. (Miss.), 684.

Other courts where this same question has arisen have held that the surety company is not a necessary party to an appeal or writ of error sued out by the principal, but nevertheless enjoys the benefit of the appeal by the principal.

In *Wren* v. *Peel*, 64 Tex., 374, the court held that a surety on a replevin bond could not be sued on the judgment against a principal and surety pending a writ of error prosecuted by the principal from the judgment.

In *Henry* v. *Whitehurst*, 64 So. R. (Fla.), 233, it was also held that where the defendant in an action of replevin prosecuted a writ of error the appeal inured to the benefit of the surety in the replevin bond who did not appeal, as well as to the benefit of the principal.

This question was carefully considered in an opinion by Judge Lurton in the case of *The New York*, 104 Fed., 561, in which the Circuit Court of Appeals for the Sixth Circuit held that a surety in a stipulation was not a necessary party to an appeal, although joined in the judgment in the trial court. In this case Judge Lurton said (pp. 563-565):

> "If the decree or judgment be joint in form, but in law or fact separable, the mere form of the decree will not make it such a joint decree as to require those nominally joined to unite in appellate proceedings. *Hanrick* v. *Patrick*, 119 U. S. 156, 163, 7 Sup. Ct. 147, 30 L. Ed. 396. The decree complained of is, in substance, that the libelant, the Erie & Western Transportation Company recover from the Union Steamboat Company 'and the American Surety Company, its surety, upon the bond or stipulation herein filed,' etc. * * * Though joint in form, if in law or fact the decree is separable it was not necessary that the surety company should join the Erie & Western Transportation Company in the particular appeal shown to have been allowed in this case. The stipulation upon which the surety company became bound as surety was one entered into under section 911, Rev. St. U. S., and admiralty rule 21. Such a stipulation stands in the place of the vessel, and its obligation is discharged by compliance with the order or decree of the court against the owner or claimant, and the liability may be enforced by 'judgment thereon against both the principal and sureties' at the time of rendering the decree in the original cause. * * *
>
> "* * * We fail to see any greater reason for regarding the stipulators, sureties in such a bond, as necessary parties to an appeal, than there is for regarding the sureties in a cost bond as parties to the

controversy. In both cases the principal controls the litigation and the sureties are bound by the result. In both cases, if a question arises as to the obligation of the surety, the latter, to the extent of this interest, should be heard, and for this purpose might appeal. Undoubtedly, if the suit is upon a bond, and the judgment is against the surety as well as the principal, both must join. But the reason is that the bond and its obligation is then the thing in controversy, and constitutes the subject matter of the litigation. To this class of cases the case of *Estis* v. *Trabue* belongs."

See, also:

The *Glide*, 72 Fed., 200.

Love v. *Export Storage Co.*, 143 Fed., 1, 11.

So far as the Mississippi cases cited by counsel for defendants in error in their brief are concerned (Brief, 6-7) it is necessary to say only that they state the general rule in the case of joint judgments against two or more defendants. If the early case of *Thomas* v. *Wyatt*, 17 Miss., 309, can be considered as stating a different rule, it is overruled by the recent case of *Jayne* v. *W. B. Nash Lumber Co., supra.*

In support of their contention counsel also cite several cases in this court in which a similar rule has been stated with reference to joint judgments, but this court has always recognized that the judgment may in fact be distributive so as to constitute a separate judgment against one of the parties.

This is recognized in *Estis* v. *Trabue*, 128 U. S., 225, one of the cases relied upon by counsel for defendants in error. (Brief, 5.) In that case the court said (p. 229):

"The judgment is distinctly one against 'the claimants and C. F. Robinson and John W. Dillard, their sureties in their forthcoming bond' jointly, for a definite sum of money. There is nothinng distributive in the judgment, so that it can be regarded as

containinng a separate judgment against the claimants and another separate judgment against the sureties, or as containinng a judgment against the sureties payable and enforceable only on a failure to recover the amount from the claimants."

The judgment, however, in the case at bar is distributive in the very sense referred to in this opinion. There is a separate judgment against plaintiff in error, Rust Land & Lumber Company, and another judgment against that company and the United States Fidelity and Guaranty Company which is expressly made conditional upon the default of the Rust Land & Lumber Company in the performance of the first judgment. Under the rule announced by this court, therefore, the surety mentioned in the judgment in the Circuit Court would not be a necessary party to the writ of error in this case even if that writ were directed to the Circuit Court. The writ of error is in fact directed to the Supreme Court of Mississippi, and the judgment entered by the Supreme Court of Mississippi in this cause has determined beyond the possibility of controversy that the surety in the replevin bond in the Circuit Court was not a necessary party to the appeal to the Supreme Court of Mississippi. The affirmance by that court of the judgment of the Circuit Court on the appeal of the Rust Land & Lumber Company alone is conclusive of this question. That the surety company is not a necessary party to the appeal is also settled by the decision in *Jayne* v. *W. B. Nash Lumber Co.*, 66 So., 813, cited *supra*. It is not necessary or possible to join in the writ of error to the Supreme Court of Mississippi a surety company which was not made a party and which was not a necessary party to the cause in the Supreme Court of Mississippi.

We submit, therefore, that there is no ground on which the United States Fidelity and Guaranty Company can

be held to be a necessary or proper party to the writ of error in this cause.

2. *No judgment appears in this record against the United Casualty & Surety Company, surety on the appeal bond, and even if the judgment in the Supreme Court of Mississippi were against that surety company instead of the United States Casualty Company, the United Casualty & Surety Company would not be a necessary party to the writ of error.*

As already pointed out in the statement, *supra*, the judgment in the Supreme Court of Mississippi first affirms the judgment of the Circuit Court, and then provides that defendants in error recover of plaintiff in error and the United States Casualty Company the amount of the judgment in the Circuit Court, with costs. The United States Casualty Company mentioned in this judgment is not a party to the record in any capacity, and the judgment against it must therefore be regarded as a nullity. This has been held in a Mississippi case—*Overstreet* v. *Davis*, 24 Miss., 393—in which it was held that a judgment against a defendant and another person as surety should be treated as a nullity so far as the surety was concerned when it appeared that the person named as surety was not in fact a party to the record.

But even if the surety mentioned in the judgment were the United Casualty & Surety Company—the surety in the appeal bond—we contend that that company would not be a necessary party to the writ of error.

The judgment in the Supreme Court of Mississippi is as clearly distributive as the judgment in the Circuit Court. The court in the first instance affirms the judgment of the court below against the plaintiff in error, the Rust Land & Lumber Company, and then provides for a recovery by the defendants in error from the plain-

tiff in error and the surety company of the amount mentioned in the judgment in the Circuit Court. The United Casualty & Surety Company was not a party to the replevin suit in the Circuit Court nor a party to the judgment in that court, and the order affirming the judgment of the Circuit Court was not an order against it. It was an order against the plaintiff in error, the party appealing, affirming the judgment of the Circuit Court against that company. The judgment against the plaintiff in error was necessarily a separate judgment, which entitled the plaintiff in error to sue out the writ of error from this court without joining the surety company, even if the surety company mentioned in the judgment had been the United Casualty & Surety Company. This is clear from the language of this court in the case of *Estis* v. *Trabue,* quoted, *supra.*

See, also, the opinion of Judge Lurton in *The New York, supra,* and *Winters* v. *United States,* 207 U. S., 564.

Not only, therefore, is the judgment of the Mississippi Supreme Court a several judgment under the rule as stated in this court, but there can be no question that it is so under the Mississippi practice. This is shown, not only by the order of the Supreme Court of Mississippi affirming the judgment of the Circuit Court in this cause in the absence of the surety company mentioned in the judgment in the court below, but by the express decision of the Mississippi Supreme Court in the very recent case of *Jayne* v. *W. B. Nash Lumber Co.,* cited, *supra.* Under the practice in Mississippi, a judgment against a surety company in a supersedeas or forthcoming bond is a conditional judgment so far as the surety company is concerned. The relationship of principal and surety continues after the judgment as before, so that the principal in the judgment can appeal without joining the surety company, while, at the same time, the

surety company has the benefit of the appeal by the principal. The character of the judgment of the Supreme Court of Mississippi in this cause must be determined by the Mississippi practice, and that no surety company in the record in this cause is a necessary party to the writ of error in this case is settled by the character of the judgment in the Mississippi Supreme Court, to which the writ of error is directed.

That the surety company in this case is not a necessary party to the writ of error is further shown by the cases in this court which state the reason for the rule that all parties to a judgment which is joint only must be joined in the writ of error. This reason is stated in the cases cited by counsel for defendants in error. (Brief, 5.) In one of these cases, *Hardee* v. *Wilson*, 146 U. S., 179, it appears that the reason for the rule adopted in such cases is that otherwise the party not appealing could not perhaps be proceeded against and would not be estopped from bringing another appeal for the same matter. This objection obviously would not apply in a case where the judgment appealed from was a judgment against a principal and a surety, and the principal alone appealed under a practice which recognized that the surety in the judgment was still only secondarily liable and was entitled to the benefit of the appeal by the principal. This is the practice in Mississippi, as we have shown, and it is clear, therefore, that the writ of error in this case, which is sued out by the principal alone, will operate for the benefit of the surety company, which is not joined in the writ, and will enable this court to dispose finally of the whole case.

This question was considered in the recent case of *Evans* v. *Stone & Brick Co.*, 20 Wyo., 188, in which many cases are reviewed, and the court held that a surety on

an appeal bond from a justice court was not a necessary party to a writ of error from the Supreme Court to review the judgment of the lower court, which, in form, was a joint judgment against the principal and surety.

Finally, we call the attention of the court to the case of *Inland & Seaboard Coasting Co.* v. *Tolson,* 136 U. S., 572, which evidently recognizes that the surety on an appeal bond in the court to which the writ of error issues may not be a necessary party to the writ of error, although the surety may be a party to the judgment.

In that case a judgment was recovered against the defendant in the Supreme Court of the District of Columbia, special term, and defendant appealed to the general term of the court, giving a bond with sureties. The general term entered a judgment affirming the judgment of the special term and providing, in addition, that the plaintiff recover the amount of the judgment in the court below against the defendant and the sureties in the bond. The writ of error from this court was sued out by the defendant alone and the sureties were not made parties. On motion, the writ of error was at first dismissed, but, subsequently, on motion of plaintiff in error, the case was restored to the docket, and the further motion of plaintiff in error, to amend the writ of error by inserting as plaintiffs in error the names of the sureties, was granted. No opinion was rendered in this case, but, on the motion to restore the cause to the docket, counsel for plaintiff in error pointed out that the judgment in that case, to which the writ of error was directed, in fact contained two separate judgments, one being a judgment affirming the judgment of the court below, and the other being a separate judgment on the undertaking to which the principal and the sureties were parties. (p. 575.) The correctness of this contention was evidently recognized by the court in restoring the

cause to the docket, although the additional motion to amend the writ of error by inserting the names of the sureties was also granted.

In any event, in the case at bar the argument that the judgment of the Supreme Court of Mississippi is several must be recognized as sound, not only by reason of the form of the judgment itself, but also by reason of the practice in Mississippi and the decisions of the Mississippi Supreme Court to which we have already referred.

We submit, therefore, that no surety company mentioned in the record in this cause is a necessary party to this writ of error. If, however, this court should allow the record to be corrected to make the United Casualty & Surety Co. a party to the judgment of the Supreme Court of Mississippi, or if that company should be regarded as a party to the judgment on the record as it stands, and this court should also consider that that company is a necessary party to the writ of error, then we ask leave, under the authority of *Inland & Seaboard Coasting Co.* v. *Tolson, supra,* to amend the writ of error by inserting the name of that surety company as a plaintiff in error.

II.

A FEDERAL QUESTION IS SHOWN TO BE INVOLVED BY THE RECORD IN THIS CASE.

In the statement of the case, *supra,* we have called attention to the fact that this cause was submitted to the jury in the Circuit Court of Coahoma County under instructions from the court which made it necessary for the jury to determine, under the evidence submitted, whether the land from which the timber in controversy was cut was situated in the State of Mississippi or the

State of Arkansas. If the jury found from the evidence "that the said lands on which the said timber was growing is not attached to the Mississippi shore or any accretions formed or attached thereto, then the jury will find for the defendant." (Rec., 161.) The jury in fact found for the plaintiffs (defendants in error), which means that the jury could not have found that the lands were "not attached to the Mississippi shore," but must have found that they were in Mississippi.

Other instructions given to the jury (Rec., 160-161) made the question of whether the lands were in Mississippi or Arkansas depend upon a determination of the boundary line between the two states in 1848, when, as the testimony shows, the Mississippi River made a new channel and formed an island, known as Horseshoe Island, which was surrounded by the old and the new channels of the river. The land in controversy in this case is situated on this island. Plaintiff in error contends that this island, including the land in controversy in this case, is, under the rules established by this court, in the State of Arkansas, and defendants in error contended in the Circuit Court of Coahoma County that the land in controversy is in Mississippi, because, before the cut-off of 1848, they claim that the channel of the Mississippi River was north and east of what is now marked as Old River or Pecan Lake on the maps introduced as exhibits in this cause. The instructions to the jury were based upon this issue between the parties and made it necessary for the jury to determine, under the evidence, whether the boundary line between the two states prior to the cut-off of 1848 was so located as to bring the land in controversy within the borders of Mississippi or Arkansas. If the then channel of the river was situated where Old River or Pecan Lake is now located, as shown by the maps, the instructions to the jury would indicate

that the lands in controversy are in Arkansas. If the then channel of the river (but not the thread of the navigable channel) was farther north and east, the jury might find the lands in Mississippi. Thus the location of the boundary line between the two states was, under the instructions of the jury, made the turning point in the case.

That this boundary line question was the controlling one in the case was repeatedly called to the attention of the Supreme Court of Mississippi after the case was in that court on appeal. It was pointed out, not only that the boundary line question was the controlling one in the Circuit Court, and that this was a federal question, but that there was then pending in this court a case between the two states (then No. 6 original) which involved the determination of the same boundary question. Before the case was decided by the Mississippi Supreme Court a motion was made to continue this cause until the case between the two states was decided, and a copy of the bill in the case in this court (which sets forth the federal statutes under which the boundary question arises) was filed with the motion to show that the same question was involved in both cases. (Rec., 178.) This motion was at first granted, but the order was later rescinded and the case decided. (Rec., 180.)

The motion for rehearing filed by plaintiff in error again called the attention of the Mississippi Supreme Court to the federal questions necessarily involved in this case, and set out at length the opinion of this court in the case of *Cissna* v. *State of Tennessee*, 242 U. S., 195, which had just been decided. The motion for rehearing was, however, overruled (Rec., 179) and the judgment of the lower court was affirmed without an opinion.

We respectfully submit, therefore, that there are pre-

sented in this case the same grounds of federal jurisdiction that were presented to this court in the case of *Cissna* v. *State of Tennessee,* recently decided by this court (March 11, 1918).

1. *The decision of the Mississippi Supreme Court involved an erroneous determination of the boundary line between the States of Mississippi and Arkansas.*

The Supreme Court of Mississippi, with full knowledge of the federal questions involved in this case, entered a judgment expressly finding "that there is no error" in the record of the case in the Circuit Court, and affirmed the judgment of that court. That judgment, however, under the instructions given, was based upon a finding which necessarily determined that the land in controversy was in the State of Mississippi and not in the State of Arkansas, and could not, as we contend, be affirmed on any other ground.

(a) Counsel for defendants in error suggest in their brief that the Supreme Court of Mississippi may have affirmed the judgment on the ground that the land did not belong to the plaintiff in error even though it was located in the State of Arkansas, and that this was a non-federal ground. (Brief, 9-13.) It is contended by counsel that "the right of plaintiff in error terminated at the high-water mark on the Arkansas shore in 1848, and did not reach to the thread of the stream, which was the boundary between Arkansas and Mississippi at that date, and which, by reason of there having been at that date an avulsion, has remained fixed from that time to this" (Brief, 9), and, further, that "a decision of the case of *Arkansas* v. *Mississippi* will establish a line that is distant at least half a mile (the Mississippi is about a mile wide at this point) from the line that is in controversy in the present case." (Brief, 11.)

But we respectfully submit that the Mississippi Supreme Court not only did not decide, but cannot be supposed to have decided the case on any such ground as is here suggested. On counsels' own statement of the contention it was necessary to find the boundary line between the two states in 1848 before the high-water mark on the Arkansas shore at that date could even be guessed at. The jury were not asked to determine that high-water mark at that date. The case was not submitted to the jury on any such theory, and there was no way, on this record, by which the Supreme Court of Mississippi could determine that the land in question was within a half mile of the boundary line between the two states in 1848, or at any place between the boundary line and high-water mark on that date.

Even if it be assumed, therefore, as a matter of law, that a riparian owner in Arkansas would not be entitled to accretions to his land on this Mississippi channel after 1848, there is nothing in the record which would enable the Mississippi Supreme Court to affirm the judgment of the Circuit Court on the ground that the land in question was formed by accretions to the Arkansas shore after 1848. The case was not submitted to the jury in a form which would make such a distinction possible. It was submitted to the jury to determine whether the land in question "was north and east of a channel of the Mississippi River when the cut-off of 1848 occurred" (Rec., 160), or whether it was situated on accretions to the Mississippi shore or accretions to the Arkansas shore, without reference to when such accretions may have occurred.

The Supreme Court of Mississippi, therefore, not only could not have based its affirmance of the judgment on the theory suggested, but obviously did not do so. The judgment of affirmance recites that this cause having

been submitted on the record herein the court is of opinion *"that there is no error therein."* It is clear, therefore, that the judgment was affirmed on the ground on which the case was submitted to the jury in the lower court, and not on a ground inconsistent therewith, which would necessarily have required a reversal of the case and a new trial under instructions different from those actually given.

Furthermore, even if the facts in the case would admit of an affirmance of the judgment on the ground suggested by counsel for defendants in error, this court, in the absence of an opinion by the Supreme Court of Mississippi, will not assume that that court did in fact affirm the judgment on an erroneous theory of law. The contention of counsel is that, even if the land in question is in Arkansas, it was between the thread of the river and high-water mark on the Arkansas shore in 1848, and the then riparian owner could not acquire title to land added by accretions occurring after the avulsion in 1848. Counsel derive this conclusion from the fact that the boundary line between the two states, under the rule announced by this court, continued to be the same that it was prior to the avulsion. But this rule does not affect the local rule as to accretions on the old channel. No case in this court or in Arkansas or Mississippi is cited which supports such a conclusion in regard to accretions to the Arkansas shore. It is inconsistent with the instructions given to the jury in this cause, and, we submit, is inconsistent with the common law rule in such cases. There is nothing in the record in this cause, or in the cases cited by counsel for defendants in error, to show that the trial court did not state correctly the rule of law applicable in this case on the subject of accretions, and there is no ground, therefore, on which it can be assumed that the Supreme Court

of Mississippi affirmed the judgment on a different and erroneous theory of law. The question is a local one, and there is no ground for saying that the Supreme Court of Mississippi differed from the trial court, or that the trial court did not apply the correct rule of law in instructing the jury that the land in question belonged to the plaintiff in error if they found that it was formed by accretions to the Arkansas and not to the Mississippi shore. (Rec., 160-161.)

If it is proper, on this question, to refer to Arkansas cases, there can be no doubt that the usual rule as to accretions is the law of that state and that the riparian owner is entitled to additions to his land formed by accretions. In the case of *Nix* v. *Pfeifer*, 73 Ark., 199, the court discussed the usual rule as to accretions in connection with an abandoned channel without any suggestion that a different rule was applicable in such a case.

That the usual rule as to accretions would apply in the case of an abandoned channel is assumed in the following cases also:

Cooley v. *Golden*, 117 Mo., 33.
Benecke v. *Welsh* (Mo.), 67 S. W. Rep., 604.

It is obvious that any other rule would be wholly impracticable. If all private rights became fixed every time they were affected by an avulsion on such rivers as the Missouri and Mississippi it would be impossible in many cases to settle the rights of private owners on the banks of such rivers.

The abandoned channel in this case did not dry up after the avulsion of 1848. It continued to be a navigable channel after that date (Rec., 157), and Old River or Pecan Lake is still several hundred yards wide and sixteen or seventeen feet in depth. (Rec., 54.)

We submit, therefore, that there is no ground on which

it can be assumed that the Mississippi Supreme Court adopted an erroneous theory of law on the question of accretions to the Arkansas shore, when it affirmed without opinion the judgment of the Circuit Court, in which an entirely different theory of law was applied, on the ground that there was no error in the record.

(b) Counsel suggest also that the Supreme Court might have affirmed the case on the ground that the testimony showed adverse possession of the land by the defendants in error. (Brief for defendants in error, 14.) But counsel fail to point to the testimony which would sustain such a contention; there is no suggestion of it in the instructions to the jury, and we are confident it cannot be found in this record. The testimony, on the contrary, shows the lands in question were in the possession of plaintiff in error and that no claims were made by others until the trespasses involved in this case occurred. (Rec., 49-53 and 121.) The land in question adjoins the land which it is agreed in this record belongs to plaintiff in error (Rec., 23), while it is separated from the land in Mississippi on which defendants in error base their claim by a body of water which is today about 900 feet in width (Rec., 54), and the claim of plaintiff in error to the ownership of the land has been known for years. (Rec., 96-121.)

(c) Counsel further contend that the navigable channel as delineated on the exhibits for plaintiff in error in this cause should not be considered as indicating the boundary line between the two states, because the Supreme Courts of Mississippi and of Arkansas have both adopted a rule for the determination of such boundary lines which is different from the rule announced by this court. (Brief, 20-21.) They contend that, under the rule adopted by the two states, the boundary line should be, not the middle of the navigable channel, but a line

equally distant from the shore lines. It is settled, however, by the decision of this court in the recent case of *State of Arkansas* v. *Tennessee* (decided March 4, 1918) that such action of the courts of the two states could not have the effect contended for.

We contend that if the boundary line in controversy in this case were established in accordance with the rule applied by this court in such cases, the land in question would be found to be in the State of Arkansas.

2. *The decision of the Supreme Court of Mississippi denied the federal rights of plaintiff in error by overruling its motion that this cause be continued to await the determination of the suit between the States of Mississippi and Arkansas then pending in this count (No. 6 Original) to settle the boundary line between the two states at the point involved in this cause.*

Counsel for defendants in error contend that this cause, even though it involve the boundary line between the States of Mississippi and Arkansas, must be determined without reference to any decision of this court in the case between the two states; that, even if this court had decided the case between the two states before the Supreme Court of Mississippi decided this case, that court, in deciding this cause, must disregard the decision of this court fixing such boundary line and decide this case exclusively upon the record of the Circuit Court of Coahoma County. (Brief, 17-18.)

If this is so, then it would follow that, as between the parties to this cause, the land in question must always be held to be in the State of Mississippi, even though this court, in the case between the two states, should determine that it is within the State of Arkansas. The defendants in error could continue to cut timber off of this land, under the judgment rendered in this cause, on

the ground that the land is in Mississippi, even though the decision of this court in the pending case between the two states should determine that the land in question is in fact in the State of Arkansas.

We respectfully submit that this contention of counsel for defendants in error is unsound, and should not be sustained by this court. We contend that the motion of plaintiff in error in the Supreme Court of Mississippi to continue this cause, on the ground that there was then pending in this court a case between the two states to fix the boundary line between those states at the point involved in this cause, and the petition for rehearing presenting the same questions, necessarily raised a federal question, in that an authority exercised under the United States was drawn in question, and that the Supreme Court of Mississippi was legally bound to recognize that authority and should be controlled by that authority in the judgment entered in this cause.

There can be no question that when this court has finally fixed the boundaries between two states by its judgment in a suit between such states, its decision is binding and controlling upon that question and must be recognized by all inferior courts. No state court could thereafter treat the boundary line as being somewhere else than in the place fixed by the judgment of this court. It follows necessarily that where the authority to determine that boundary line has been assumed by this court, in a pending case between two states, and the attention of a state court is called to that fact, in a case in which is involved the location of the same boundary line, a federal question is presented, and the state court cannot act in disregard of the authority of this court, which is already invoked, or defeat the right of this court to determine such federal question for all purposes, by de-

ciding the state court case before the decision of this court in the pending case between the two states.

That being so, a federal question was necessarily raised in this case by the motion in the Supreme Court of Mississippi to continue this cause until the case then pending in this court to determine the boundary line between the States of Arkansas and Mississippi was decided, and the right of plaintiff in error to have that question determined by this court was denied by the overruling of its motion and by the decision of the Supreme Court affirming the decision of the Circuit Court.

The federal character of the question thus raised is shown by another consideration. The question of the boundary line between the two states in this case not only arises under federal statutes, but the boundary question can be finally and conclusively settled only by an action in which the states concerned are parties. This court is the only court having jurisdiction under the federal Constitution of controversies between states, and is the only court which can conclusively settle disputed boundary questions between states. When a suit, therefore, has been commenced in this court between two states to settle a boundary controversy, a proceeding has been instituted which will result in a judgment which will be conclusive of the question involved and will determine finally, not only the rights of the two states, but of all other parties. The settling of the boundary line in such a proceeding is not a mere private matter; it is a matter of public concern which involves the sovereign rights of states. It is not like the bringing of a suit between private parties, in which is involved a question similar to one involved in another suit already pending between other private parties. The decision in such private suit is binding only upon the parties before the court, but the decision of a boundary question by this

court between sovereign states settles the question once and for all for the states and for all persons. Private parties cannot thereafter litigate that question without regard to the decision of this court on the ground that they were not parties to the suit between the states. To all intents and purposes they are parties to the suit between the states and are bound by the judgment of this court in such a case, and all inferior courts must take judicial notice of such decision as constituting the law of the land.

We contend, therefore, that when the Mississippi Supreme Court, by the motion in this case, had notice of the pendency of the suit between the States of Arkansas and Mississippi (No. 6, Original) it had notice of a proceeding which, under the federal Constitution, would determine the boundary line question, not only as between the states, but between all parties, including the parties to this cause. To overrule that motion and affirm the judgment of the Circuit Court was to deny plaintiff in error a claimed federal right to have the boundary question involved in this case determined by this court under and in accordance with the Constitution and laws of the United States. We submit that the denial of this federal right clearly entitles plaintiff in error to the writ of error granted by this court.

3. *The boundary question between the two states was a federal question which was raised and decided both in the Mississippi Supreme Court and in the Circuit Court.*

Counsel for defendants in error contend that because the question of the boundary line in this case was determined as a question of fact by the jury in the trial court, there is no federal question in this case. (Brief, 15.) But obviously the existence of a federal question is determined, not by the way in which it was decided, but by

the fact that it was decided. The writ of error in this case is directed to the Supreme Court of Mississippi, and that court affirmed the judgment of the trial court with full knowledge of the federal questions involved and of the fact that the judgment thus affirmed determined that the land in question in this case was in the State of Mississippi and not in the State of Arkansas.

If the boundary question was a question which should be decided only by a court and not by a jury, the court to determine the question was *this* court. The Mississippi Supreme Court, therefore, should have left the question for the determination of this court (as was requested by plaintiff in error) instead of leaving it finally to the decision of a jury, under erroneous instructions, by affirming the judgment of the trial court before this court had decided this peculiarly federal question.

We submit, therefore, that the fact that a boundary line question between the States of Arkansas and Mississippi was decided in this cause necessarily involves a federal question which was properly raised and decided in the Supreme Court of Mississippi. The Supreme Court of Mississippi was informed that the boundary question was a federal question, and its affirmance of the judgment of the trial court with such knowledge was necessarily a decision of that federal question.

Furthermore, it is not true, as counsel contend, that "the case was fought out without reference to any federal question" in the trial court. (Brief, 18.) It is evident from the record and from the instructions to the jury that the trial court took judicial notice of the federal nature of the boundary line question. The instructions of the court, as we have shown, made the case turn on that question, and the boundary line between the states was necessarily a question arising under federal

statutes, which, as the court also knew, could be determined conclusively and finally only by a decision of this court. All parties, and the court also, knew that the question to be decided was a federal question and the instructions were based on that ground. The court was not only bound to, but did in fact, take judicial notice of the federal nature of the boundary line question.

> "This court has had frequent occasion to hold that it is not always necessary that the federal question should appear affirmatively on the record, or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the state court." (*Kaukauna Co.* v. *Green Bay, etc., Canal,* 142 U. S., 254, 269.)

We submit, therefore, that a federal question was necessarily considered and decided, both by the trial court and by the Mississippi Supreme Court, and that the motion to dismiss or affirm in this case should be denied.

Respectfully submitted,

HERBERT POPE,
Attorney for Plaintiff in Error.